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JCT Ltd v Muniandy a/l Nadasan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCC)(W)-1228-07 OF 2014
ABDUL AZIZ ABD RAHIM, DAVID WONG AND ABANG ISKANDAR
JJCA
30 DECEMBER 2015

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*Civil Procedure — Pleadings — Findings on matters not pleaded
— Respondents brought action on basis of undue preference against appellant
— Trial court found in favour of respondents based on s 293 of the Companies Act
1965 and s 53 of the Bankruptcy Act 1967 — Whether undue preference
specifically pleaded by respondent — Whether learned judge correct to make
finding of undue preference payment under aforesaid provisions — Bankruptcy
Act 1967 s 53 — Companies Act 1965 ss 293 & 304*

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The respondents were the employees of a company known as CNLT (Far East) Bhd (in liquidation) ('CNLT') whereas the appellant was a substantial shareholder in CNLT. At the trial stage, the learned judge in paras (e), (f) and (g) of its orders, allowed the respondents' claims that certain payments channeled to the appellant by CNLT were fraudulent preference payments pursuant to s 293 of the Companies Act 1965 ('the CA') read together with s 53 of the Bankruptcy Act 1967 ('the BA'); and void. Dissatisfied with the decision, the appellant filed the present appeal. The issues for deliberation were whether undue preference under s 293 of the CA read together with s 53 of the BA was specifically pleaded by the respondent and if not, whether the learned judge correct to make a finding of undue preference payment under the said provisions.

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Held, allowing the appeal with costs of RM83,000; and setting aside orders (e), (f) and (g) of the High Court:

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- (1) The learned judge could not grant orders which the respondents did not ask for in their prayers. The appellant had no duty to rebut evidence when they were of no relevance to the premised cause of action which in this case was expressly s 304 of the CA, ie, intent to defraud creditors of CNLT. On the facts, paras 16.20(iv) and 18.3 of the re-amended statement of claim referred to the court by the respondents were insufficient to constitute a pleading for undue preference (see paras 32–33).

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[Bahasa Malaysia summary]

Responden-responden adalah pekerja-pekerja syarikat yang dikenali sebagai CNLT (Far East) Bhd (dalam likuidasi) ('CNLT') sementara perayu adalah pemegang saham dalam CNLT. Pada peringkat bicara, hakim yang bijaksana di perenggan (e), (f) dan (g) perintahnya, membenarkan tuntutan responden-responden bahawa bayaran tertentu yang disalurkan kepada perayu oleh CNLT adalah bayaran keutamaan fraud berikutan kepada s 293 Akta Syarikat 1965 ('AS') dibaca bersama dengan s 53 Akta Kebankrapan 1967 ('AK'); dan batal. Tidak puas hati dengan keputusan, perayu memfailkan rayuan ini. Isu-isu untuk penentuan adalah sama ada keutamaan tak wajar di bawah s 293 AS dibaca bersama dengan s 53 AK adalah diplidkan dengan khusus oleh responden dan jika tidak, sama ada hakim yang bijaksana betul untuk membuat dapatan terhadap bayaran keutamaan tak wajar di bawah peruntukan tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM83,000; dan mengeneipkan perintah-perintah (e), (f) dan (g) Mahkamah Tinggi:

- (1) Hakim yang bijaksana tidak dapat memberikan perintah-perintah yang mana tidak diminta oleh responden-responden di dalam permohonan mereka. Perayu tidak mempunyai tanggungjawab untuk mematahkan keterangan apabila ianya tidak relevan kepada kausa tindakan yang didasarkan yang mana dalam kes ini adalah nyata s 304 AS, iaitu, niat untuk menipu pemiutang-pemiutang CNLT. Atas fakta, perenggan 16.20(iv) dan 18.3 pernyataan tuntutan yang dipinda semula dirujukkan kepada mahkamah oleh responden-responden adalah tidak mencukupi untuk membentuk pliding bagi keutamaan tak wajar (lihat perenggan 32–33).]

Notes

For cases on findings on matters not pleaded, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7052–7058.

Cases referred to

- Birbra Lake Holdings Pty Ltd (in liq) v Firmadoor Australia Pty Ltd (t/as Cleveland Industries WA)* [1992] 7 ACSR 380, SC (refd)
- Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331, FC (not folld)
- RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, FC (refd)
- Sateras Resources (M) Bhd, Re* [2006] 3 MLJ 140, CA (refd)
- Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1998] 4 MLJ 569, FC (refd)

A Legislation referred to

Bankruptcy Act 1967 s 53
Companies Act 1965 ss 293, 304

B Appeal from: Suit No 22NCC-68-01 of 2013 (High Court, Kuala Lumpur)

Ariff Rozhan (William Lim Wee Chong, Johnson Lim Fung Tat and Muhammad Izzat Md Jonid with him) (Ariff Rozhan & Co) for the appellant.
Wong Rhen Yen (Eric Tan, Emily Goh, Ahmad Ezmeel and Emily Wong with him) (Ong Kok Bin & Co) for the respondents.

C David Wong JCA (delivering judgment of the court):

INTRODUCTION

D [1] This is an appeal against the decision of the High Court in which the learned judge allowed the plaintiffs/respondents' claims that certain payments channelled to the eighth defendant/appellant were fraudulent preference payments and void.

E [2] We heard this appeal together with another appeal which is W-02-(NCC)(W)-1229-07 of 2014 ('Appeal 1229'). Both appeals emanated from the same judgment given in Suit 22(NCC)-68-01 of 2013.

F [3] The appellant in this appeal is the eighth defendant in the aforesaid suit while the appellant in Appeal 1229 is the first defendant, one Dato' Prem Krishna Sahgal.

G [4] After hearing parties on 6 May 2015, we reserved judgment and we now give our decision and grounds of the same.

[5] Despite having heard the two appeals together, we see fit that separate judgment be given for each appeal as it concerns different area of law.

H BACKGROUND FACTS

I [6] The factual matrix has been succinctly set out by my learned brother, Justice Abang Iskandar bin Abang Hashim in his judgment for Appeal 1229 and I adopt them with the necessary amendments.

[7] The respondents were the employees of CNLT (Far East) Bhd, the ninth defendant ('CNLT') which carries the business of manufacturing and sale of yarn. CNLT was wound up on 16 January 2009 and in liquidation now.

- [8] The first to sixth defendants were all the directors of CNLT. The seventh defendant, who did not enter an appearance in this action, was at all material times, the human resources manager of CNLT. The eighth defendant, JCT Ltd is an Indian incorporated company and is a substantial shareholder in CNLT. A
- [9] The first defendant was at all material times the executive managing director of CNLT and for all intents and purposes the controlling mind of CNLT. He is of Indian nationality. B
- [10] The claim of the respondents was for arrears of salary and workers' compensation in the sum of RM2,910,201.78 relying on the cause of action of the tort of conspiracy to injure. C
- [11] The particulars of the respondents' cause of action were these. CNLT provided the solvency declaration to the Kuala Lumpur Stock Exchange ('BURSA') showing that they were solvent when in fact they were not, hence misleading the respondents who were then creditors, BURSA as well the general public. D
- [12] It is also alleged that the appellant in Appeal 1229 and the rest of defendants, despite the fact of their knowledge that CNLT was insolvent and a non-going concern, continued to mislead the employees, creditors, investors and general public that CNLT was a going concern so as to enable it to continue to trade and be given credit facilities, by unsuspecting creditors and suppliers. E
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- [13] Further from March 2008 till 16 January 2009 (the date when CNLT was finally wound up), no payment was made to the respondents. However on 30 April 2008 and 10 May 2008 a memoranda was issued to the respondents placing them on full pay and assuring them that their contracts of employment would continue in force. G
- [14] The memoranda according to the respondents amounted to a deception as the appellant in Appeal 1229 and the rest of the defendants knew full well that there would be no payment coming. H
- [15] Premised on those particulars, the respondents filed this suit seeking a declaration that the business of CNLT had been carried out with intent to defraud the creditors of CNLT and the declaration that the defendants were liable for all the debts or liabilities of CNLT. I

A THE HIGH COURT DECISION

[16] The learned judge sustained the respondents' claims and made the following orders:

- B** (a) the plaintiffs are entitled to a declaration that the business of CNLT (Far East) Bhd was carried on by Sahgal with intent to defraud the creditors of CNLT including plaintiffs pursuant to s 304 of the Companies Act 1965;
- C** (b) the plaintiffs are hereby granted a declaration that Sahgal is personally liable to the employees of CNLT and is hereby ordered to pay the outstanding debt due and owing to the plaintiffs in the sum of RM2,910,201.78 as set out in Schedule 2 of the statement of claim;
- D** (c) the plaintiffs are granted interest at the rate of 5%pa from the date of judgment to the date of final settlement, payable by Sahgal;
- (d) there is no declaration granted under s 304 in respect of any of the other defendants or directors of CNLT;
- E** (e) an order is hereby made by this court that all payments channelled to JCT Ltd which amount to fraudulent preference as outlined above are hereby declared void;
- (f) an inquiry/assessment by the liquidator for an account of monies siphoned or channelled to JCT Ltd by Sahgal;
- F** (g) an order for the repayment by JCT Ltd of those monies wrongfully channelled to or dissipated by Sahgal to JCT Ltd be made to the liquidators for distribution amongst the body of unsecured creditors in accordance with the law; and
- G** (h) the costs of this action are to be borne by the defendants, jointly and severally in a sum to be assessed by this court after hearing submissions on the same.

OUR GROUNDS OF DECISION

H *Preliminary objection*

[17] Prior to the hearing of the appeal, we had dealt with a motion by CNLT, who is the ninth defendant, to strike out this appeal on the ground that they were not made a co-respondent in this appeal. As CNLT is under liquidation, **I** CNLT appeared before us pursuant to a court order dated 17 March 2015 from the winding up court authorising Vaaibz Pte Ltd, a creditor of CNLT and Alok Kumar Sarda, a contributory of CNLT, to conduct this litigation on behalf of

CNLT. We have some doubt as to the validity of this order as CNLT can only be represented by the liquidator who was present in court and informed the court he takes a neutral stand on the outcome of the litigation. Be that as it may, as this order was not challenged by the appellant, we heard the motion.

[18] The crux of this motion is that CNLT will be affected by the orders made by the learned judge, they must be made a co respondent. Learned counsel referred us to the case of *Re Sateras Resources (M) Bhd* [2006] 3 MLJ 140 where the Court of Appeal held as follows:

In the present appeal before us by Sateras, by not citing the applicant as a respondent, being one of the interveners in the court below, and necessarily a party in the proceeding, his status and legal rights would be directly affected by any substantive decision in the appeal, if we were to go on hearing the appeal on merits. In the event that the decision in the appeal goes against its interest, the problem would await them in the Federal Court when an attempt is made to seek the leave of the Federal Court to appeal against the decision made by this court. Also, the applicant in the course of the proceedings in the court below had incurred costs in opposing the petition. By not having been cited as a respondent in this appeal, it would be facing a problem when it comes to the question of its costs against the appellant.

[19] Further, learned counsel submitted that CNLT would have no recourse to the Federal Court should this court make a decision against CNLT and hence would be prejudicial to them.

[20] In opposing this motion learned counsel for the appellant submitted that the appellant in this appeal is only concerned with paras (e), (f) and (g) of the orders of the High Court. It was submitted that nowhere in those orders refer to CNLT. They are orders made concerning the liquidator of CNLT and not CNLT or their creditors. Learned counsel refers us to the case of *Birbra Lake Holdings Pty Ltd (in liq) v Firmadoor Australia Pty Ltd (t/as Cleveland Industries WA)* [1992] 7 ACSR 380 where the Supreme Court of Western Australia held as follows:

Moneys paid in circumstances which create an undue preference, and which are recoverable under s 451(1), are moneys which are recoverable for the benefit of the creditors and contributories. Such moneys cannot be said to have been the property of the company and nor are they owned by the recipients thereof as a debt to the company. Accordingly, the following words of Lord Davey in *Kent v La Communaute Des Soeurs De Charite De La Providence* [1903] AC 220 at p 226 are apposite to a claim brought under s 451(1): 'It is appropriate for the liquidator to sue in his name in the interests of the creditors and contributories to impeach some

A act or deed of the company committed for winding up’.

[21] As CNLT is in liquidation we see merits in the contention of learned counsel of the appellant. Furthermore, liquidators had not taken part in the proceeding in the High Court.

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[22] Upon the aforesaid reasons, we dismissed the motion — encl 9a and proceeded with the appeal proper.

C APPEAL PROPER

[23] To recap, in this appeal we are concerned only with the following orders of the High Court:

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(a) all payments channelled to the appellant which amount to fraudulent preference are declared void;

(b) an inquiry/assessment by the liquidator for an account of monies channelled or siphoned to the appellant by the first defendant (at the High Court); and

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(c) an order for the repayment by the appellant of those monies wrongfully channelled to or dissipated by the first defendant (at the High Court) to the appellant to be made to the liquidators for distribution amongst the body of unsecured creditors in accordance with the law.

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[24] The grounds of appeal as contained in the memorandum of appeal and summarised by learned counsel for the appellant are as follows:

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(a) the learned judge erred in law and failed to appreciate that the provisions of s 293 of the CA read together with s 53 of the BA are only applicable or relevant to the liquidator;

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(b) the learned judge erred in law and failed to appreciate that the issue of undue preference (under s 293 of the CA read together with s 53 of the BA) was not specifically pleaded by the respondents and as such, the respondents are precluded from raising the said issue; and

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(c) the learned judge erred in law and/or in fact in finding that CNLT’s payments of USD1.25m to the appellant were preferred repayment to an unsecured creditor, in preference over the rest of the body of unsecured creditor.

[25] This appeal can be dealt with by deliberating on these issues:

(1) was undue preference (under s 293 of the Companies Act 1965 (‘the CA’) read together with s 53 of the Bankruptcy Act 1967 (‘the BA’)

specifically pleaded by the respondent? and

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- (2) if the answer to issue 1 is in the negative, was the learned judge correct to make a finding of undue preference payment under s 293 of the CA together with s 53 of the BA?

Issue 1

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[26] It is the argument of the appellant's counsel that what the learned judge ordered in so far as 'undue preference' payment to JCT cannot be reconciled to what had been prayed for in the re-amended statement of claim. For clarity the prayers sought are as follows:

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- (a) a declaration that the businesses of CNLT (Far East) Bh (Company No 13856 — You ('CNLT')) have been carried on by the defendants with intent to defraud creditors of CNLT, in particular the plaintiffs pursuant to s 304 of the Companies Act 1965;
- (b) a declaration that the defendants shall be jointly and/or severally liable and personally responsible, without any limitation of liability, for all of the debts or other liabilities of CNLT;
- (c) an order that the defendants, jointly and/or severally do pay the outstanding debt due and owing to the plaintiffs by CNLT, as pleaded in the Second Schedules;
- (d) general damages to be assessed by this honourable court;
- (e) interest at the rate of 5%pa from 16 January 2009 (the date of the winding up order) on the decreed sum allowed by this honourable court until full settlement thereof;
- (f) costs on a solicitor client basis;
- (g) costs of this action; and
- (h) further order and/or other relief, which this honourable court may deem fit and fair in the circumstances of this case.

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[27] Counsel for the respondents however refer the court to paras 16.20 (iv) and 18.3 of the re-amended statement of claim which respectively read as follows:

16.20 (iv) — Dissipation of asset to JCT

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- (a) In June 2007, two months before the presentation of the first winding up Petition on 13 August 2007 CNLT remitted the sum of USD1.25m to the eighth defendant purportedly to settle JCT's loan to CNLT.

- A (b) At the material time, no announcement on the above payment to JCT was made to the relevant authorities as required under the listing requirements and/or law.

- B 18.3 Engaging and/or carrying on and/or undertaking the business of CNLT by settling its debt with its preferred and/or related creditors when CNLT was insolvent in breach of the law.

- C [28] Premised on those pleadings, counsel for the respondents submit that it is not correct to say that undue preference payment was not pleaded. Further it was submitted that the appellant never objected to the allegations at trial and is estopped from raising the objection here relying on the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331.

- D [29] The relevant paragraph of the learned judge's grounds on this issue is at para 135 where she said as follow:

- E 135. This then was Sahgal's evidence when tested on the issue of whether the USD1.25m was the repayment of a loan to JCT Ltd or whether it was a refund and compensation. It is clear to my mind that the payment of USD1.25m to JCT Ltd was a preferred repayment of an advance to an unsecured creditor and shareholder in preference over the rest of the body of unsecured creditors. It contravened s 293 of the Companies Act 1965 read together with s 53 of the Bankruptcy Act 1967. I so concluded because I found Sahgal's evidence to be entirely implausible for the following reasons:

- F (i) There is no documentary evidence substantiating this alleged order for ordinary as well as 'specialised' yarn from JCT Ltd. There is only Sahgal's oral evidence;
- G (ii) There is no documentary evidence in relation to the alleged late supply of such yarn. In fact there is no evidence that JCT Ltd required this yarn as of February 2007;
- H (iii) There is no written demand from JCT Ltd for compensation for such alleged late delivery. On the contrary there is simply nothing in writing on this subject between the two entities, CNLT and JCT;
- I (iv) There was no discussion at the board level in CNLT in relation to the issues of either a refund of the sum of USD890,000 or compensation of USD360,000. It would be expected that a decision to refund such large sums of money and to voluntarily pay out compensation of USD360,000 particularly in a company which had just declared itself to be in a financially precarious situation would require serious deliberation, not to mention disclosure to several authorities;
- (v) These payments were not disclosed to the audit committee. In this context therefore Izham and Ishah had no knowledge of such disbursements;

- (vi) The decision to allegedly 'refund' and 'compensate' JCT Ltd could only come from Sahgal and the resident Indian Directors or one or more of them; **A**
- (vii) These payments were not recorded in the audited accounts of either CNLT or JCT Ltd; **B**
- (viii) No announcement was made to Bursa in relation to these substantial payments out to CNLT's largest shareholder; **C**
- (ix) These payments out to JCT Ltd were made after it was announced that CNLT had been classified as a PN17 company and after the announcement that it had suffered substantial losses for the first quarter of 2007; **D**
- (x) Man Mohan Thapar, D2, had written a letter on 29 March 2007 to CIMB, a secured lender of CNLT seeking support and confirming that RM3.2m had been brought in by shareholders in December 2006. This is exactly the amount which was remitted by JCT Ltd to CNLT in the form of USD890,000. However Sahgal chose to explain these monies as having been remitted for the purchase of goods by JCT Ltd from CNLT. In other words D2's letter too evidences the fact that the sum of USD890,000 was a shareholder advance by JCT Ltd to meet the flailing needs of CNLT; **E**
- (xi) This sum of money was reported as a shareholder advance from JCT Ltd in CNLT's 2006 annual report; **F**
- (xii) Despite the recording of these monies as an advance from JCT Ltd there is no record of these monies having been remitted back to JCT in June 2007. Neither is there any corresponding reduction shown in JCT Ltd's shareholder advances; **G**
- (xiii) There is no explanation forthcoming from JCT Ltd in respect of this entire transaction as no witnesses testified on its behalf. Instead it relied on the evidence of Sahgal. **H**

136. It would appear that having sent RM3.2m odd by way of shareholder advances in December 2006, seemingly to prop up a failing CNLT, Sahgal ensured that these monies were remitted back to JCT Ltd through these undocumented repayments in June 2007. Such payments clearly contravene many aspects of insolvency law as I have pointed out earlier. **I**

137. It appears to this Court that allegation no (iv) is made out. This amounts to a dissipation or siphoning out of CNLT's assets without disclosure to the auditors, Bursa or any relevant authority. It was entirely a matter between JCT Ltd and CNLT.

[30] We have no doubt that the learned judge was correct in her analysis of the factual matrix in coming to the conclusion that she did. What confronts us is whether she had the jurisdiction to make such findings when there is no such specific pleadings by the respondents.

A [31] The law pertaining to the court's power, concerning an unpleaded cause of action is clear and suffice for us to refer to the case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, where the Federal Court held the following:

B The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings ...

C On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

E [32] It is undisputed that when evidence was led on this matter of undue preference, there was neither objection nor rebuttal to the evidence proffered by the respondents. That said, we are of the view that this does not help the respondents as the learned judge cannot with respect grant orders which the respondents did not ask for in their prayers. The appellant with respect had no duty to rebut evidence when they are of no relevance to the premised cause of action which in this case is expressly s 304 of the CA, ie, intent to defraud creditors of CNLT.

G [33] With respect the case of *Boustead* relied on by counsel for the respondents is not applicable as in that case it related to an unpleaded cause of action. Here the respondents had premised their action on s 304 only. We find that the paras 16.20(iv) and 18.3 referred to us by the respondents were insufficient to constitute a pleading for undue preference. Indeed, in the course of his submissions before us, learned counsel for the respondents relied on the omnibus prayer as the premise to convince us that this court 'undue influence' could fall into that clause. With respect, we cannot accede to that submission.

H The omnibus prayer is not a pleading clause. Facts ought to have been specifically pleaded which would show that there was undue preference, as was now alleged by the respondents and found by the learned trial judge despite the issue was not pleaded to that effect by the respondents.

I [34] Accordingly we agree with the appellant's contention that the orders (e), (f) and (g) of the learned judge cannot stand as she had deviated from the litigants' dispute as per the pleadings.

Issue 2

[35] In view of our finding on issue 1, it is not necessary for us to deliberate this issue. Be that as it may, for completeness we will express our view on the same.

[36] It is the contention of the appellant that the learned judge erred when she failed to appreciate that s 293 of the CA read together with s 53 of the BA can only be relevant to the liquidator. Hence when the liquidator was not even a party to this suit, these two sections cannot be utilised.

[37] Section 293 of the CA reads as follows:

- (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner.
- (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
 - (a) In the case of a winding up by the Court —
 - (i) the date of the presentation of the petition; or
 - (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier; and
 - (b) In the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
- (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Section 53 of the BA:

- (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and

- A every such act shall be deemed fraudulent and void as against the Director General of Insolvency.
- (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.
- B (3) For the purposes of this section 'creditor' includes a surety or guarantor for the debt due to that creditor.

C [38] These two provisions were subject of consideration by the Federal Court in the case of *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1998] 4 MLJ 569, where the apex court held the following:

D We must now turn to consider s 293 of the Companies Act. The law relating to fraudulent preferences is set out in s 53 of the Bankruptcy Act, which is made applicable to companies by s 293 of the Companies Act, and is designed to preserve the sanctity of the pari passu principle by which creditors in a winding up share rateably in the assets available for distribution ...

E To take the matter further, it is clear law that the court has no power to make an order setting aside payments and transfer made in the run up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied ...

The onus was, of course upon the liquidator to satisfy all the five requirements aforesaid.

F ... The principle of central importance underlying s 293(1) of the Act is that where a debtor company, has at a relevant time, given a preference to any person, the liquidator may apply to the court for an order under the section setting aside the preference.

G [39] Needless to say we are bound by the judgment of the apex court. That being the case, we are constrained to find that the learned judge had erred in not appreciating the nature of the aforesaid provisions.

CONCLUSION

H [40] This is a case where with respect that the trial judge had deviated from the dispute as framed by the litigants and made orders not asked for by the respondents. That course of action in an adversarial justice system is not allowed for the simple reason that the 'goal posts' during the game so to speak cannot be changed.

I [41] For reasons stated above we allow the appeal with costs in the sum of RM83,000 We also set aside orders (e), (f) and (g) of the High Court. Finally we order the deposit to be refunded.

Appeal allowed with costs of RM83,000; orders (e), (f) and (g) of High Court set aside. **A**

Reported by Dzulqarnain Ab Fatar

B**C****D****E****F****G****H****I**